LIBRARY
SUPREME COURT, U. S.

FILED
MAY 12 1969
JOHN F. DAVIS, CLERK

No. 1261

In the
Supreme Court of the United States
OCTOBER TERM, 1968

CONSTRUCTION AGGREGATES CORPORATION,
a Delaware corporation,

Petitioner,

vs.

HEWITT-ROBINS INCORPORATED,
a New York corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE B. CHRISTENSEN
38 South Dearborn Street
Chicago, Illinois 60603
Counsel for Respondent

ROBERT F. MITCHELL
666 Glenbrook Road
Stamford, Connecticut 06906

EDWARD J. WENDROW
38 South Dearborn Street
Chicago, Illinois 60603
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

The Petition For Writ Of Certiorari Should Be Denied Because It Presents No Question Worthy Of The Exercise Of This Court's Certiorari Jurisdiction. 1

Conclusion 7

Table of Cases Cited

Alabama State Federation of Labor v. *McAdory,* 325 U.S. 450, 471 4

Carrado v. *United States,* 210 F. 2d 712, 723 (App. D. of C.), cert. den. 347 U.S. 1018 5

Copeland v. *United States,* 152 F. 2d 769, 770 (App. D. of C.), cert. den. 328 U.S. 841 5

Doane v. *Jacobson,* 244 F. 2d 710 (C.A. 1) 5

Fillipon v. *Albion Vein Slate Co.,* 250 U.S. 76 6

Garst v. *United States,* 180 F. 339, 345 (C.A. 4) 5

Huddleston v. *Dwyer,* 322 U.S. 232, 237 4

Oertle v. *United States,* 370 F. 2d 719, 729 (C.A. 10) 5

Outlaw v. *United States,* 81 F. 2d 805 (C.A. 5), cert. den. 298 U.S. 665 5

Palmer v. *Hoffman,* 318 U.S. 108, 116 6

Shields v. *United States,* 273 U.S. 583 6

United States v. *Blane,* 375 F. 2d 249, 255 (C.A. 6), cert. den. 389 U.S. 835 5

United States v. *Standard Oil Co.,* 316 F. 2d 884, 896 (C.A. 7) 5

PAGE

AUTHORITIES CITED

F.R.C.P., Rule 61 6
28 U.S.C. § 2111 6
Uniform Commercial Code, Sec. 2-207 4
Rule 19, Supreme Court of the United States 1, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1261

CONSTRUCTION AGGREGATES CORPORATION,
a Delaware corporation,

Petitioner,

vs.

HEWITT-ROBINS INCORPORATED,
a New York corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The Petition For Writ Of Certiorari Should Be Denied Because It Presents No Question Worthy Of The Exercise Of This Court's Certiorari Jurisdiction.

The petition presents two questions of Illinois law and one of federal law. The Illinois law questions relate to whether a contract between petitioner and respondent for the sale of parts for a conveyor system contained, under Illinois common and statutory law, a limited or a general warranty by respondent as to the goods sold. The Court of Appeals held that the jury could find the parts were sold pursuant to a contract with a limited

warranty. No effort is made by petitioner to show that the Illinois law questions were decided by the Court of Appeals contrary to "applicable state law" (Rule 19 of this Court). Moreover, any reversal of them would be a futility because of the Court of Appeals' further ruling, not challenged here, that, even on the hypothesis of a full warranty sale, there was ample evidence to sustain the jury's verdict.

The federal law question is whether the District Court violated petitioner's constitutional rights in sending written instructions to the jury room. This was within the District Court's discretion, but, even if it erred, the point presented is a minor one of trial procedure which did not affect the substantial rights of petitioner and is too unimportant to merit review by the Court.

Petitioner was the successful bidder on a contract for the construction of dikes to enclose a certain area of the Dead Sea in order to form "evaporation pans" to be used to extract minerals from which potash would be produced (App. 55, 56). To construct the pans it was necessary to excavate and move a large amount of earthen material from a "borrow pit." Petitioner entered into negotiations with respondent for a cost-plus contract to design and furnish parts for a conveyor system that was to move the earthen material from the borrow pit to a point where it could be transported to dikes in the Dead Sea that would form the pans (App. 756, 759, 769). This resulted in a number of meetings and correspondence between May 25, 1962, and July 31, 1962 (A. 3-8, 8-10, 12, 13, 14, 15, 18; A.A. 20). On July 5, 1962, petitioner sent its purchase order to respondent (A. 14, 15). On July 20, 1962, respondent accepted the purchase order,

"predicated" on certain "clarifications, additions, or modifications" to the order (A. 18). Among them was a limited warranty clause set forth at p. 508 of 404 F. 2d. Petitioner made no objection to the terms of the letter except that on July 31, 1962, its treasurer telephoned a representative of respondent requesting a change in the terms of payment contained in the letter (A. 98). These changes were verbally accepted and confirmed in a letter by respondent dated July 31, 1962 (A.A. 20). Later petitioner accepted the parts and respondent's engineering services.

Petitioner commenced construction of the conveyor system in November, 1962 (A. 288). The plant did not operate satisfactorily at first and respondent sent over some employees, who remedied most of the difficulties (A. 1173, 1456; A.A. 10).

Petitioner tried the case on the theory that respondent was liable for breaches of implied warranties in connection with the parts of the system that it sold. Respondent, on the other hand, contended that the jury could find that its letter of July 20, 1962, limiting warranties, was part of the contract between the parties; that, in any event, the jury could find that the parts sold were reasonably fit. The Court of Appeals, in interpreting Section 2-207 of the Uniform Commercial Code, in force in Illinois, first held, "The jury could determine that CAC [petitioner] had accepted H-R's [respondent's] July 20 terms."

1. The initial point urged by the petition is that the lower court should have held, as a matter of law, a contract had been formed between the parties on or before June 30, 1962, prior to respondent's letter of July 20, 1962, limiting warranties. This question is solely one of Illinois contract law. Petitioner, in contending that the Court of Appeals erred, cites no Illinois authority and makes no

reference only to the Restatement of the Law of Contracts and a decision of the Court of Appeals for the Second Circuit (Petn. 9, 10). We submit, that a narrow point of Illinois contract law, arising out of a unique set of facts, which is not even claimed to be in conflict with any Illinois decision, is unworthy of the exercise of this Court's certiorari jurisdiction.

2. The second point of Illinois law raised is the construction to be given to Section 2-207 of the Commercial Code. As already noted, the Court of Appeals, interpreting that section, held that respondent's expressly conditional letter of July 20, 1962, coupled with petitioner's subsequent conduct, warranted the jury in finding that the letter, limiting warranties, was part of the contract between the parties.

No effort is made to show that the construction given to Section 2-207 by the Court of Appeals is in conflict with any Illinois decision. Petitioner claims that the Court of Appeals decision is in conflict with a decision by an intermediate court of review in Michigan (Petn. 14, 21). We do not think the contention is well-founded, but, even if it were, this Court's certiorari jurisdiction is not exercised to resolve conflicts among the states, even in the interpretation of uniform state laws. Any construction which this Court might give the Illinois statute would be one "which the state court would not be bound to follow." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 471. In *Huddleston* v. *Dwyer*, 322 U.S. 232, 237, this Court observed that "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determinations of questions of state law by the intermediate federal appellate courts." This is not one of those exceptional cases.

Finally, even if this Court should review and reverse the Court of Appeals on the state law questions, the outcome of the case would not be affected. In resolving them against petitioner the Court of Appeals held it was a jury question whether the parts respondent sold were sold under a limited warranty. But, as an alternative ground for decision, it held that even without the limitation it was a jury issue whether the goods sold were reasonably fit. It said that, "In any case, our review of the record convinces us that the jury would have been warranted in resting its verdict" on specified faults of the petitioner in operating, installing and supervising the machinery (404 F. 2d at p. 510). This holding is not challenged by the petition. Certiorari should not be granted to review state law points which are academic in any event under the alternative holding of the Court of Appeals.

3. The final point of the petition is that the District Court erred in sending the written instructions to the jury room in the absence of the parties and counsel and without notice and an opportunity to object. As in the case of the state law issues, this point raises no question meriting review by this Court.

Doane v. *Jacobson*, 244 F. 2d 710 (C.A. 1), holds that in a civil case it is within the discretion of the trial judge whether to send a written copy of the Court's charge to the jury room. Various courts of appeal have laid down the same rule even in criminal cases. *Oertle* v. *United States*, 370 F. 2d 719, 729 (C.A. 10); *United States* v. *Blane*, 375 F. 2d 249, 255 (C.A. 6), cert. den. 389 U.S. 835; *Copeland* v. *United States*, 152 F. 2d 769, 770 (App. D. of C.), cert. den. 328 U.S. 841; *Carrado* v. *United States*, 210 F. 2d 712, 723 (App. D. of C.), cert. den. 347 U.S. 1018; *United States* v. *Standard Oil Co.*, 316 F. 2d 884, 896 (C.A. 7); *Garst* v. *United States*, 180 F. 339, 345 (C.A. 4).

In *Outlaw* v. *United States*, 81 F. 2d 805 (C.A. 5), cert. den. 298 U.S. 665, the Court held that the giving of instructions in writing at the jury's request, without the knowledge of defendant's counsel, was not ground for reversal in a criminal case.

Petitioner cites *Fillipon* v. *Albion Vein Slate Co.*, 250 U.S. 76, where in a personal injury action, the District Court, in response to an inquiry by the jury in the absence of counsel, sent a supplementary written instruction to the jury on the subject of contributory negligence which this Court held to be erroneous. The other decision of this Court cited by the petitioner is *Shields* v. *United States*, 273 U.S. 583, where, in a criminal case, the District Court, in the absence of defendant or his counsel, sent a written instruction to the jury and this Court held its action violated the rule entitling the defendant to be present from the time the jury is impaneled until after rendering its verdict and discharge.

Neither decision has application to the case at hand where the Court merely gave to the jury in writing what it had previously told them verbally. No substantial right of petitioner was prejudiced thereby; no error was committed, but, if there was, it was of the most harmless sort. 28 U.S.C. § 2111; Rule 61 F.R.C.P.; *Palmer* v. *Hoffman*, 318 U.S. 108, 116.

CONCLUSION

Under the considerations governing review on certiorari, embodied in Rule 19 of this Court, the petition should be denied.

Respectfully submitted,

GEORGE B. CHRISTENSEN
38 South Dearborn Street
Chicago, Illinois 60603
Counsel for Respondent.

ROBERT F. MITCHELL
666 Glenbrook Road
Stamford, Connecticut 06906

EDWARD J. WENDROW
38 South Dearborn Street
Chicago, Illinois 60603
Of Counsel.